STATE OF MICHIGAN

COURT OF APPEALS

STATE AUTOMOBILE INSURANCE CO.,

Plaintiff-Appellant,

v

MICHAEL SHERMAN, PROCOM TOWERS, INC., and MONTICELLO INSURANCE CO.,

Defendants-Appellees.

UNPUBLISHED
May 23, 2006

No. 265689
Wexford Circuit Court
LC No. 04-018558-CK

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

In this action for declaratory relief, plaintiff State Automobile Insurance Company appeals as of right the trial court's order denying its motion for summary disposition and granting summary disposition in favor of defendant Monticello Insurance Company ("defendant"). We vacate and remand.

In the underlying action, Michael Sherman filed suit against ProCom Towers, Inc. for injuries sustained when ProCom employees unhitched a trailer from a pickup truck without properly securing the tires of the trailer, causing the tongue of the trailer to swing around and strike Sherman in the leg. As a result of his injuries, Sherman underwent a below-knee amputation on his left leg. ProCom, which was insured under a business auto policy issued by plaintiff and a commercial general liability policy issued by defendant, filed a complaint for declaratory relief seeking a determination of whether defendant had a duty to defend ProCom in the underlying action. State Auto also filed a complaint for declaratory relief seeking a determination of whether it had a duty to defend ProCom in the underlying action.

Sherman settled the underlying action for $1 million and the parties agreed that payment of the settlement would be based on the outcome of the declaratory judgment action between plaintiff and defendant. Thereafter, defendant filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10) asserting that Sherman's claims were covered under the State Auto policy and excluded under the Monticello policy because his injuries arose out of the use of an "auto." State Auto filed a cross-motion for summary disposition under MCR 2.116(C)(10) asserting that Sherman's claims were covered under the Monticello policy and excluded under the State Auto policy because his injuries resulted from the use of "mobile equipment." The trial court denied plaintiff's motion and granted summary disposition in favor of defendant.

Plaintiff contends that the trial court erred in granting summary disposition in favor of defendant because Sherman's injuries were covered under terms of the Monticello policy. We agree.

"This Court reviews de novo a trial court's decision granting or denying summary disposition in a declaratory judgment action." *Citizens Ins Co v Pro-Seal Service Group, Inc*, 268 Mich App 542, 546; _____ NW2d _____ (2005). Because the trial court relied on matters outside the pleadings, we will construe the motion as having been granted pursuant to MCR 2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). Further, interpretation of an insurance contract is a question of law this Court reviews de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

In *Royal Property Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714; 706 NW2d 426 (2005), this Court set forth the following general insurance contract principles:

> "[I]nsurance policies *are* subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005) (emphasis in original). " 'The primary goal in the construction or interpretation of a contract is to honor the intent of the parties[.]' " *Klapp, supra* at 473, quoting *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). "[T]he language of the parties' contract is the best way to determine what the parties intended." *Klapp, supra* at 476.

" 'In determining whether an insurance policy applies, this Court must first determine whether the policy is clear and unambiguous on its face. In doing so, the insurance contract should be read and interpreted as a whole.' " *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 115; 617 NW2d 725 (2000), quoting *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 649; 517 NW2d 864 (1994).

The Monticello policy clearly and unambiguously excludes coverage for injuries arising out of the use, operation, loading, or unloading of an "auto." However, the Monticello policy provides that "auto" does not include "mobile equipment." Under the Monticello policy, "mobile equipment" includes "[v]ehicles . . . that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types: . . . [c]herry pickers and similar devices used to raise or lower workers." We conclude that the trailer was "mobile equipment" under the Monticello policy because the trailer was not self-propelled and was maintained primarily to provide mobility to a winch, a device that was attached to the trailer and used to raise and lower the ProCom workers who were hired by Sherman's employer to paint a 1200-foot media tower. Consequently, the trailer cannot be considered an "auto" under the Monticello policy and, therefore, Sherman's injuries are not excluded under defendant's auto exclusion. Because the Monticello policy provides coverage for bodily injuries arising out of the use or operation of mobile equipment and because no exclusion otherwise precludes coverage in this case, we hold that Sherman's injuries were covered under the

Monticello policy. Thus, the trial court erred in granting summary disposition in favor of defendant.

Plaintiff also contends that the trial court erred in denying plaintiff's motion for summary disposition because Sherman's injuries, which resulted from the use of mobile equipment, were excluded under the State Auto policy. We disagree.

The State Auto policy provides coverage for bodily injuries resulting from the ownership, maintenance or use of a covered "auto." The policy states that "auto" does not include "mobile equipment" and that "mobile equipment" includes "[v]ehicles . . . that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types: . . . [c]herry pickers and similar devices used to raise or lower workers." The trailer meets plaintiff's definition of "mobile equipment" because the trailer is not self-propelled and is maintained primarily to provide mobility to the winch, a device that is attached to the trailer and used to raise and lower workers. However, we agree with the trial court that plaintiff specifically listed the trailer as a covered "auto" on the declarations page of its policy. Two trailers were listed on the declarations page of the policy and there is no evidence indicating that the trailers listed did not include the trailer that caused Sherman's injuries.

Furthermore, because the declarations page is considered part of the insurance policy, *Royal Property, supra* at 715, and because the declarations page is in conflict with the definitions section of the policy, we conclude that the State Auto policy is ambiguous.

> If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against its drafter and in favor of coverage. [*Clevenger v Allstate Ins Co*, 443 Mich 646, 654; 505 NW2d 553 (1993), quoting *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982).]

In construing the State Auto policy against plaintiff, we hold that the policy covers injuries resulting from the use of the winch trailer.

Plaintiff contends, nonetheless, that Sherman's injuries are not covered under the State Auto policy because there is an insufficient causal connection between the use of the trailer and his injuries. We disagree. Where there is no dispute about the facts, whether an injury arose out of the use of a vehicle presents a question of law for a court to decide. *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 630; 563 NW2d 683 (1997).

In *Pacific Employers Ins Co v Michigan Mutual Ins Co*, 452 Mich 218; 549 Mich 872 (1996), our Supreme Court stated that causation in an insurance case should be determined as follows:

> "[W]hile the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably

> identifiable with the normal use, maintenance and ownership of the vehicle." [*Id.* at 224-225, quoting *Kangas v Aetna Cas & Surety Co*, 64 Mich App 1, 17; 235 NW2d 42 (1975).]

The causal connection between the use of the trailer and Sherman's injuries was not merely incidental or fortuitous because Sherman's injuries arose out of the inherent use of the trailer. Moreover, the trailer itself produced the injury. Further, because it is foreseeable that an individual standing near a trailer may be injured if the trailer is unhitched without properly securing the wheels of the trailer, Sherman's injuries were foreseeably identifiable with the normal use (i.e., unhitching) of the trailer.

Further, we reject plaintiff's argument that under *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998), Sherman's injuries were covered under the Monticello policy and excluded under the State Auto policy because his injuries were not closely related to the "transportational function" of the trailer. In explaining the "use of a motor vehicle 'as a motor vehicle' " limitation on no-fault coverage found in MCL 500.3105, the *McKenzie* Court stated, "[w]hether an injury arises out of use of a motor vehicle 'as a motor vehicle' turns on whether the injury is closely related to the transportational function of automobiles." *Id.* at 215. However, because the State Auto policy does not contain the same "as a motor vehicle language" as the no-fault act, cases like *McKenzie* that apply the no-fault language "provide no useful guidance" on the issue before this Court. *Indiana Ins Co v Auto-Owners Ins Co*, 260 Mich App 662, 675-676; 680 NW2d 466 (2004). Because Sherman's injuries resulted from the use of the trailer, his injuries were covered under the State Auto policy.

Finally, plaintiff contends that because the allegations in the underlying complaint are allegations of general negligence, defendant is the only insurer obligated to provide coverage for Sherman's claims. We disagree.

Whether an insurer is obligated to defend certain claims under its policy presents a question of law requiring interpretation of the insurance contract. *American Bumper & Mfg Co v Nat'l Union Fire Ins Co*, 261 Mich App 367, 375; 683 NW2d 161 (2004). The insurer must provide a defense where the allegations of a third party even arguably come within the policy coverage. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-451; 550 NW2d 475 (1996). If there is any doubt regarding whether an allegation comes within the scope of the policy, the doubt must be resolved in favor of the insured. *Id.* at 455.

Claims that pertain directly to the general operation of a business and are unrelated to the operation, maintenance, or use of a motor vehicle fall within the scope of a general liability policy and not an automobile liability policy. See e.g., *Wakefield Leasing Corp v Transamerica Ins Co*, 213 Mich App 123; 539 NW2d 542 (1995). Because some of the allegations in the underlying complaint pertain directly to the operation of ProCom's business, they fall within the scope of the Monticello policy. However, " '[a]n insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy.' " *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 481; 642 NW2d 406 (2001), quoting *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1981). We conclude that the following theories of recovery pertain to the use of the trailer and, therefore, fall within the scope of the State Auto policy:

> Failure to adequately anchor the hoist trailer to avoid its shifting or moving while in use.
>
> Failing to properly attach the hoist cable from the trailer to the tower to assure that it could be safely operated and used.

Consequently, plaintiff and defendant were obligated to defend ProCom in the underlying action.

However, because Sherman's injuries are covered under both the State Auto and Monticello policies, the insurers are obligated to provide coverage according to the "Other Insurance" clauses in the insurance policies. " 'Other Insurance' clauses are provisions inserted in insurance policies to vary or limit the insurer's liability when additional insurance coverage can be established to cover the same loss." *St Paul Fire & Marine Ins Co v American Home Assurance Co*, 444 Mich 560, 564; 514 NW2d 113 (1994).

Because the winch trailer is considered "mobile equipment" under the Monticello policy, the loss did not arise out of maintenance or use of an "auto," as defined by defendant and, therefore, defendant's coverage is primary. Coverage under the State Auto policy is also primary because Sherman's injuries resulted from the use of the trailer, which plaintiff designated as a covered "auto." Both policies state that where multiple insurance policies provide primary coverage for the same loss, the insurers are obligated provide coverage on a pro-rata basis. Thus, because each insurer's limit of insurance constitutes 50 percent of the total applicable limits of insurance, the judgment in favor of defendant is vacated and the case is remanded for entry of a judgment declaring that plaintiff and defendant are each obligated to pay 50 percent of the settlement in the underlying action.

Vacated and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis